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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1424

JAMES W. FITZGERALD,

Petitioner,

VS

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent,

SOUTHERN PACIFIC COMPANY, a corporation,

Real Party in Interest.

Respondent's Brief in Opposition to Petition for Writ of Certiorari

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OPINIONS BELOW

After reviewing petitioner's briefs, both the California District Court of Appeal and Supreme Court declined to grant him hearings. No written decisions were issued by those appellate courts. A memorandum opinion and order of dismissal issued by the trial judge is appended to petitioner's brief as Exhibit D.

JURISDICTION

Jurisdiction exists by virtue of 28 U.S.C. § 1257(3) and 45 U.S.C. §§ 51 et seq.

QUESTION PRESENTED

Notwithstanding petitioner's assertions to the contrary, there is only *one* question presented by this case: Did the trial court abuse its discretion in dismissing the instant suit and ordering it transferred to El Paso, Texas, (1) where petitioner resides, (2) where respondent Southern Pacific (hereinafter "SPCO") conducts extensive railroad operations, (3) where petitioner's accident occurred, (4) where one dozen potential railroad employee witnesses reside, and (5) where all three *treating* doctors reside?

Petitioner's attorneys (herinafter "Hildebrand firm") devote almost three pages to a discussion of purported "issues" raised by the action of the California courts. It is submitted, however, that all of those issues have time and time again been resolved against them, not only by the California appellate courts, but by this court as well. In *Price v. Atchison, T. & S. F. Ry. Co.*, 42 Cal.2d 577 (1954), cert. den. 348 U.S. 839, the California Supreme Court held that the doctrine of *forum non conveniens* could be utilized in the appropriate case to effect a dismissal of a transitory action brought pursuant to the Federal Employers' Liability Act (hereinafter "FELA"), 45 U.S.C. §§ 51 et seq. The Hildebrand firm appealed to this court for relief and their petition for a writ of certiorari was denied. More recently, in *Farmer v. Superior Court*, Alameda Superior Court No. 390 601, another of the Hildebrand firm's imported FELA cases was dismissed on *forum non conveniens* grounds. Following a denial of relief by the California appellate courts, a petition was filed with this court. Certiorari was denied at 397 U.S. 1022. Shortly thereafter, in *Great Northern Ry. Co. v. Superior Court*, 12 Cal.App.3d 105 (1970), cert. den. 401 U.S. 1013, a panel of the Court of Appeal reaffirmed the validity of the *Price* decision, *supra*,

and ordered another Hildebrand firm transitory FELA suit dismissed on *forum non conveniens* grounds. This court again denied certiorari.

The important point to consider with respect to the foregoing cases is that the Hildebrand firm made precisely the same strained legal and factual arguments in them that it makes here. It is submitted that this court should reject them as it has done in the past.

STATUTES INVOLVED

As noted above, petitioner's action was brought pursuant to 45 U.S.C. §§ 51 et seq. Of particular relevance to this action is section 56, which provides in part as follows:

> "Under this chapter an action may be brought . . . in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business. . . . The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states."

Thus, under section 56, petitioner had a choice of bringing his action (1) in Delaware, where SPCO is incorporated, (2) in Texas, where the accident occurred, or (3) in California, where SPCO does business. Furthermore, petitioner had a choice—because of the concurrent jurisdiction provision—of filing in either a U.S. district court or a state court of general jurisdiction.

Another pertinent code section—the one by which the trial court ordered petitioner's action transferred to Texas—is California Code of Civil Procedure ("C.C.P.") section 410.30, which provides:

> "When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state,

> the court shall stay or dismiss the action in whole or in part on any conditions that may be just."[1]

C.C.P. § 410.30 is patterned after the federal *forum non conveniens* statute, 28 U.S.C. § 1404(a), which reads as follows:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."[2]

STATEMENT OF THE CASE

A. Facts of the Accident.

Petitioner alleges injury on September 9, 1968, while employed as a switchman by SPCO in El Paso, Texas. He alleges that while riding a train in SPCO's railroad yard in El Paso, the train came to an unexpected and violent stop, throwing him from the car and causing his injury.

Two railroad train crews, numbering nine other employees, were witnesses to either his fall and/or the sudden stop. A declaration filed on June 6, 1969, in connection with SPCO's *forum non conveniens* motion, is attached hereto as Exhibit One. It identified the aforementioned witnesses and generally recites the expected testimony of each. In addition, it discloses the names and expected testimony of

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1. A review of the trial court's order of dismissal will show that it conditioned the order on SPCO's agreement (1) to submit to jurisdiction in Texas, (2) to waive any applicable statutes of limitation, and (3) to make its business records available in Texas just as though the action was being tried pursuant to California rules of discovery.

2. This court has expressly held that section 1404(a) can be asserted in FELA actions. (*Ex parte Collett*, 337 U.S. 55; *Kilpatrick v. Texas & P. Ry. Co.*, 337 U.S. 75.) It follows that if a *federal forum non conveniens* statute can be successfully utilized in FELA suits in the U.S. district courts, an analogous *state* provision must also be given effect in the proper case—since, as noted above, Congress provided for *concurrent jurisdiction* in FELA actions.

several other employees who took part in subsequent investigation of the accident. Finally, the declaration states the names of doctors who treated petitioner's injury. The significance of the foregoing is that all of the individuals named in the declaration—including petitioner himself—are residents of El Paso, Texas.

B. Inconvenience of San Francisco Forum.

On May 24, 1971, SPCO filed the declaration of John Caldwell, Assistant to the General Claims Manager of the railroad, one of whose responsibilities was the payment of SPCO's litigation expenses. Mr. Caldwell's declaration is appended hereto as Exhibit Two. In it, he states that it would cost the railroad an additional $9,310 to try the case in San Francisco as opposed to El Paso, where the accident happened. This figure is based upon a compilation of air fares, additional per diem expenses required for both lay and medical witnesses, and additional meal and lodging costs.

C. Hildebrand Firm's Practice of Importing FELA Cases.

The aforementioned declaration of John Caldwell (Exhibit Two) also discusses the practice of the Hildebrand firm of "importing" transitory FELA lawsuits into California, the basis being their belief that California juries award higher verdicts than those of other states. At the time Mr. Caldwell's declaration was prepared, the Hildebrand firm had pending in San Francisco against SPCO alone, 23 such imported lawsuits. The problem facing SPCO —as well as all other railroads doing business in California —is of obvious significance.

However, the problem is equally significant for California jurors, who have no interest in these transitory cases. And California taxpayers have an equally understandable complaint concerning the use of their tax monies to support law-

suits having no connection whatever with the state. Finally, San Francisco's courts are, like those of most of our large cities, woefully deficient in providing *swift* justice. As the June 7, 1971, declaration of SPCO attorney Robert Taggart (appended as Exhibit Three) points out, it takes almost three years to bring a lawsuit on for trial in San Francisco. On the other hand, the same declaration states that the delay time in El Paso is 6 to 8 months in state courts, 6 months in the federal courts. No doubt one of the factors causing this disparity is the large number of imported FELA cases brought into the California courts by several large plaintiffs' firms (such as the Hildebrand office) which specialize in railroad lawsuits.

D. Proceedings to Present.

On March 3, 1969, petitioner filed his FELA action in the San Francisco Superior Court. Jurisdiction was proper, since SPCO admittedly does business in California. Likewise, venue was proper under California's two venue provisions.[3]

Notwithstanding the fact that petitioner had properly brought his action in the San Francisco Superior Court, SPCO moved to dismiss on *forum non conveniens* grounds. The basis for the motion was that (1) petitioner was a resident of Texas, (2) as were all the witnesses, (3) as were all the treating doctors; (4) SPCO was amenable to service of process, jurisdiction and venue in El Paso, just as it was in San Francisco; (5) California taxpayers had no interest in petitioner's action; (6) nor did prospective jurors, (7) nor

3. C.C.P. § 395(a) provides that a personal injury suit is to be brought in the county where the accident occurred or where the defendant resides. And California's Constitution (Art. XII, section 16) provides that if the defendant is a corporation, it is to be sued in the county where its principal place of business is situated. It is conceded that SPCO's principal place of business in California is in San Francisco.

did California's already overcrowded court system; (8) SPCO's defense would be greatly handicapped because of the lack of subpoena power over Texas residents; (9) the cost of transporting and maintaining witnesses would be prohibitive; and (10) holding the trial in San Francisco would rule out the opportunity for a jury view of the accident scene. SPCO's motion was filed on April 21, 1969, and was initially set for hearing on May 8, 1969. However, at the request of petitioner's attorneys, it was put over until May 14, and then to May 28. In the meantime, those attorneys went about establishing "contacts" between petitioner and California. They brought him to Oakland and, on May 7, had him examined by a doctor frequently used by them in litigation. When that doctor's diagnosis agreed with petitioner's El Paso doctors, they sent him (on May 8) to two other doctors (one in Vallejo, the other in Sacramento) for further examinations. They then submitted a declaration on petitioner's behalf in which he stated,

> "I desire to go ahead with treatment by Doctor McIvor and Doctors Walter Bromberg and Charles Tranter [the three California doctors who examined him], and I expect to continue on treatment with them and to follow through on their advise and guidance as to my future medical attention. With this in mind, I expect to return to the San Francisco Bay region for such further treatment . . ."

Largely because of this blatant attempt by the Hildebrand office to establish California "contacts" for petitioner, SPCO's motion was denied.

The motion was renewed a year and one-half later for two reasons. First, in the interim the California legislature had enacted C.C.P. § 410.30, thus giving statutory authority to the *forum non conveniens* doctrine — which theretofore had been simply a creature of the equitable decisional law of

California. (See *Price v. Atchison, T. & S. F. Ry. Co., supra,* 42 Cal.2d 577.) Secondly, in April of 1971, almost two years after petitioner had declared under penalty of perjury that he "desired to go ahead with treatment" by the three California doctors and "expected to return to the San Francisco Bay region for such further treatment," SPCO subpoenaed the medical records of those doctors and determined that he had never returned to see them after the single "contact-making" examination. Accordingly, SPCO's renewed motion was granted, the trial court noting that SPCO's original motion had been denied because the first judge had been "misled by declarations filed on behalf of plaintiff," and that the Hildebrand firm had had petitioner "examined by doctors located in the Bay Area for the purpose of retaining the case in this Court rather than for purposes of treatment."

Petitioner's unsuccessful appeals to the California courts and to this court have followed.

ARGUMENT

A. This Court Has Held That Forum Non Conveniens Motions Can Be Successfully Urged in FELA Actions.

As noted in footnote 2, *supra,* this court has held that under appropriate circumstances the doctrine of *forum non conveniens* can successfully be urged in FELA actions, even in cases where jurisdiction and venue are proper. (*Ex parte Collett,* 337 U.S. 55; *Kilpatrick v. Texas & P. Ry. Co.,* 337 U.S. 75.) Indeed, the doctrine of *forum non conveniens* presupposes that jurisdiction and venue are proper, a point that was recognized by this court in *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 504: "Indeed, the doctrine of *forum non conveniens* can never apply if there is an absence of jurisdiction or mistake of venue."

One other factor that is implicit in the doctrine — and which the *Gulf Oil* decision recognized — is that there must be an *alternate forum* which is also proper from a jurisdictional and venue standpoint:

> "In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them." (330 U.S. at 506-07.)

In this case, there can be no question but that there is another, more convenient forum (for everyone except the Hildebrand firm) in which SPCO is amenable to process; that forum being Texas. And because of the conditions contained in the trial court's order, petitioner is free to file his suit there now, if he has not already done so.

B. This Court Has Also Held That When FELA Actions Are Prosecuted in State Courts, State Laws Governing Forum Non Conveniens Motions Are Followed.

In the case of *Missouri ex rel. Southern Ry. Co. v. Mayfield,* 340 U.S. 1, this court sanctioned the use of the *forum non conveniens* doctrine in FELA actions brought in state courts under the concurrent jurisdiction provision of 45 U.S.C. § 56. Thus, the remaining *legal* question is whether California has adopted a *forum non conveniens* doctrine — either by statute or case law — which is applicable to FELA cases.

C. California Has, First by Decisional Law, Now by Statute, Recognized the Applicability of the Doctrine of Forum Non Conveniens in FELA Actions.

Several years after this court — via the *Mayfield* case, *supra* — gave the go-ahead to state courts to dismiss FELA cases on *forum non conveniens* grounds, the California Supreme Court did so in the case of *Price v. Atchison, T. & S. F. Ry. Co.,* 42 Cal.2d 577 (1954), cert. den. 348 U. S. 839. That action involved facts almost identical to the one before this court. And not surprisingly, the Hildebrand firm represented the plaintiff in that case also. The plaintiff was

a resident of New Mexico, and the accident, the witnesses and sources of proof were all localized in the same state. The only California contact, as with this case, was that Price was represented by the Hildebrand firm and the Santa Fe Railway was amenable to process here. The Santa Fe moved to dismiss on forum non conveniens grounds and the motion was granted. On appeal to the California Supreme Court, the dismissal was affirmed.

In particular, the court held that where the plaintiff in such an action was not a resident of this state, and had no legitimate interest to be served by prosecution of his action in the courts of this state, the action may be dismissed; the dismissal being justified by the following considerations: (1) difficulties and inconvenience to defendant, to the trial court, and to jurors hearing the case, of attempting to proceed where witnesses are not amenable to process, and where testimony may have to be presented by deposition; (2) where the added expense to defendant of bringing out-of-state witnesses from distant points is not counter-balanced by any claims of advantage to plaintiff; and (3) where burden and expenses are imposed upon local taxpayers, courts, and juror, in providing a forum for the trial of an imported lawsuit. The court continued:

> "... Although there is no statutory authorization for such transfer by state courts, and although under the doctrine of *forum non conveniens* a cause arising outside California will be dismissed rather than transferred, we are of the view that the injustices and the burdens on local courts and taxpayers, as well as on those leaving their work and business to serve as jurors, which can follow from an unchecked and unregulated importation of transitory causes of action for trial in this state (see discussion 35 Cal. L.Rev. 402-415) require that our courts, acting upon the equitable principles and within the constitutional limits herein-

above stated, exercise their discretionary power to decline to proceed in those causes of action which they conclude, on satisfactory evidence, may be more appropriately and justly tried elsewhere." (42 Cal.2d at 583-84.)

Following the California Supreme Court's decision, the Hildebrand firm petitioned this court for relief. Certiorari was denied at 348 U.S. 839.

In 1970, the California legislature enacted C.C.P. § 410.30, thus providing a *statutory* basis for the *forum non conveniens* doctrine. Although petitioner apparently contends that the California courts have applied the doctrine exclusively to FELA lawsuits (which is not true), a reading of section 410.30 reveals that it applies generally to *any* actions and is not confined to FELA suits.

Shortly after section 410.30 became effective, a California Court of Appeal decided the case of *Great Northern Ry. Co. v. Superior Court,* 12 Cal.App.3d 105 (1970). That case, also an imported FELA action handled by the Hildebrand firm, involved the death of a Great Northern employee (a Washington resident) in an accident occurring near Spokane, Washington. His widow also resided there. The Hildebrand firm secured the appointment of one of their legal secretaries as a special administratrix for the purpose of filing the action in California. The trial court denied the railroad's *forum non conveniens* motion. The Court of Appeal reversed, ordering the case dismissed. Relying on *Price v. Atchison, T. & S. F. Ry., supra,* and C.C.P. § 410.30, the court held that it was an *abuse of discretion* for the trial court to have denied the motion when the lawsuit's only California connections were the railroad's business in California, the plaintiff's Oakland attorneys, and the residence of the "strawman" administratrix. The court said:

> "Weighing the several factors which should have guided the trial court's discretion it becomes apparent that the failure to apply the doctrine of *forum non conveniens* was an abuse of discretion. There was a complete absence of any showing that the legitimate interests of the widow and beneficiary of Mr. Gibson's estate will be served by a trial in Oakland, California. Upon the uncontroverted facts, the ends of justice and fairness require that the action be tried in Washington where the accident occurred and where the real party in interest and the witnesses reside." (12 Cal.App.3d at 14-15.)

The court then proceeded to list 25 factors to be considered, weighed and balanced in ruling on *forum non conveniens* motions. Adopting that approach, below are listed each of these factors. After each factor is an explanation of its application to the instant case.

1. *The amenability of the defendant to personal jurisdiction in the alternative forum.*

SPCO is engaged in business in Texas and may readily be served with process and sued in Texas.

2. *The relative convenience to the parties and witnesses of trial in the alternative forum.*

The petitioner and *all* witnesses reside in Texas. Obviously the convenience of plaintiff, SPCO and all witnesses will be better served by a Texas trial.

3. *The differences in conflict of law rules applicable in this state and in alternative forum.*

This complaint being based on federal law, the rules of law should be identical in both states. This factor has only a neutral effect on this motion.

4. *The principal place of business of the defendant.*

The principal place of business of SPCO is in California and is the *only* factor connected with California.

5. *Whether the situation, transaction or events out of which the action arose exists, occurred in, or had a substantial relationship to this state.*

The accident alleged in the complaint occurred in Texas.

6. *Whether any party would be substantially disadvantaged in having to try the action (a) in this state or (b) in the forum in which the moving party asserts it ought to be tried.*

SPCO will be disadvantaged by a trial here because of the locus of the accident and the residence of all witnesses in Texas. There will be no disadvantage to plaintiff if the action is tried in Texas where the accident occurred.

7. *Whether any judgment entered in the action would be enforceable by process issued or other enforcement proceedings undertaken in this state.*

This is also a neutral factor as a judgment rendered in either California or Texas could be readily satisfied in either state.

8. *Whether witnesses would be inconvenienced if the action were prosecuted (a) in this state or (b) in the forum in which the moving party asserts it ought to be prosecuted.*

Obviously the convenience of the Texas witnesses would be served by a trial in that state. There are no California witnesses.

9. *The relative expense to the parties of maintaining the action (a) in this state and (b) in the state in which the moving party asserts the action ought to be prosecuted.*

A San Francisco trial would cost SPCO substantially more than a Texas trial. A substantial saving to plaintiff would undoubtedly result from a Texas trial.

10. *Whether a view of premises by the trier of fact will or might be necessary or helpful in deciding the case.*

A view of the premises in Texas may be necessary or helpful.

11. *Whether prosecution of the action will or may place a burden on the courts of this state which is unfair, inequitable or disproportionate in view of the relationship of the parties or of the cause of action to this state.*

In view of the absence of any relationship of the accident to California, the fact that plaintiff does not reside in California, and the slight relationship created by SPCO's business in California, it would be an unfair and disproportionate burden on this court to hear this action.

12. *Whether the parties participating in the action have a relationship to this state which imposes upon them an obligation to participate in judicial proceedings in the courts of this state.*

The only relationship is the fact that this court has personal jurisdiction over SPCO.

13. *The interest, if any, of this state in providing a forum for some or all of the parties to the action.*

California has absolutely no interest in providing a forum for this action.

14. *The interest, if any, of this state in regulating the situation or conduct involved.*

The complaint alleges a federal cause of action arising in another state and California has no interest in regulating the conduct involved in the complaint.

15. *The avoidance of multiplicity of actions and inconsistent adjudications.*

Individual joint tort-feasors, if any, who presumably do not reside in California could only be reached by a separate action.

16. *The relative ease of access to sources of proof.*

All sources of proof are in Texas.

17. *The availability of compulsory process for attendance of witnesses.*

California process may not compel attendance of Texas witnesses.

18. *The relative advantages and obstacles to a fair trial.*

A fair trial would be better assured in the locale of the accident and of the evidence.

19. *The public interest in the case.*

There may be such public interest in and around El Paso, Texas; there is none in California.

20. *Whether administrative difficulties and other inconveniences from crowded calendars and congested courts are more probable in the jurisdiction chosen by plaintiff.*

The time between the filing of a complaint and the trial date is currently 33 months in San Francisco. The time between the filing of a complaint and the trial date in El Paso is 6 to 8 months.

21. *Whether imposition of jury duty is imposed upon a community having no relation to the litigation.*

The jurors of the San Francisco community have no relation to the litigation.

22. *The injustice to, and burden on, local courts and taxpayers.*

It would be unjust and burdensome to require this court and its taxpayers to pay both in money and time for trial of this imported lawsuit.

23. *The difficulties and inconvenience to defendant, to the court, and to jurors hearing the case, attending presentation of testimony by depositions.*

Presentation of testimony by deposition is extremely unsatisfactory.

24. *Availability of the forum claimed to be more appropriate.*

Both federal and state courts are available in Texas.

25. *The other practical considerations that make trial of a case convenient, expeditious and inexpensive.*

The practical difficulties and logistics of presenting a defense requiring proving facts occurring outside California should be obvious.

As indicated above, 22 of the 25 factors in this case operate affirmatively and require dismissal of the action on *forum non conveniens* grounds. Two factors (Nos. 3 and 7) operate neutrally and may be ignored. The only negative factor of the 25 is the principal place of business which is in San Francisco. Such factor deserves little weight as it is counterbalanced by SPCO's extensive business activities in Texas and by the fact that the location of SPCO's principal place of business has absolutely no bearing on any issue in the case. This was recognized in *Great Northern*, where plaintiff contended that the fact that the railroad engaged in business in California was sufficient to outweigh the other factors requiring dismissal. Relying on *Price, supra*, the court rapidly disposed of that argument, noting that although most of Santa Fe's business had been carried on in California, the *Price* court had nevertheless granted Santa Fe's motion to dismiss.

The only other connection with California is plaintiff's retention of a California law firm. However, plaintiff's de-

sire for California attorneys is not a factor to be considered. That factor was also rejected in the *Great Northern* case, where the court held that plaintiff's desire to retain a California law firm was irrelevant:

> "To allow the beneficiary of a cause of action to obtain and *retain* foreign jurisdiction simply by reaching across a number of states in selecting 'the attorney of her choice' would enfeeble, if not destroy, the legitimate purpose of the doctrine here under consideration. Such permissiveness would obviously be unreasonable. It is not the law." (12 Cal.3d at 112.)

Likewise, the convenience of plaintiff's counsel and the hope that a San Francisco jury might award a larger verdict than a Texas jury were deemed irrelevant by the *Great Northern* court:

> "Certain other considerations, although not argued, are suggested by the record before us. The convenience of counsel for the plaintiff may not be given weight by the court; this is conceded by plaintiff. Nor may the probability, if such exists, that courts and juries in large metropolitan areas will be more generous in their awards be considered."

The *Price* and *Great Northern* cases, especially when read in connection with C.C.P. § 410.30, demonstrate that California has adopted a fair and thoughtful *forum non conveniens* procedure. Inasmuch as this court has sanctioned such a procedure in state court FELA actions, nothing more of an affirmative nature need be said at this time.

With respect to the arguments made by petitioner, several comments should be made in conclusion. First, petitioner stubbornly misperceives the nature of the doctrine of *forum non conveniens* and continues to argue irrelevant (and uncontested) points concerning the fact that proper jurisdiction and venue exist in this case.

Second, petitioner ignores the fact that numerous arguments made by him (e.g., that California considers a tort action to be a suit on a debt—whatever legal result that leads to) are of *state concern* only, and if rejected by the state courts, should end there.

Third, petitioner argues at pages 14-19 of his brief that "mandate is the appropriate remedy," despite the fact that he is seeking a writ of certiorari. We are at a loss to either understand or respond to this contention.

Fourth, petitioner contends that there was an insufficient showing made by SPCO to support its motion and the court's order. We disagree. It should be obvious from the facts recited above (and in the attached exhibits) that there was, if anything, an overabundance of facts justifying the court's order and none supporting petitioner's alleged connection with this state.

Finally, and most important, petitioner has not cited one modern case, either state or federal, which supports his position. We, on the other hand, have cited numerous cases which support ours.

CONCLUSION

For the foregoing reasons the trial court's order dismissing the San Francisco action (and in effect transferring it to El Paso) should be affirmed. This petition presents no federal question that has not already been decided by the cases of *Ex parte Collett* and *Missouri ex rel. Southern Ry. Co. v. Mayfield, supra*. Accordingly, petitioner's request for a writ of certiorari should be denied.

In the alternative, however, this court might consider the past practice of the Hildebrand firm in petitioning this court for relief every time one of its imported FELA cases

is sent back from whence it came. It is costly and time-consuming to respond to the Hildebrand "canned brief," which has been filed over and over in numerous similar cases before this court. Accordingly, respondent makes two alternative suggestions: (1) That the Hildebrand firm (which is the *real* interested party on this appeal) be required to pay respondent's costs on appeal, together with reasonable attorneys fees; and/or (2) That the court issue a short memorandum or *per curiam* opinion settling once and for all the question that seems to be nagging at the collective mind of the Hildebrand firm, viz.: Can an FELA action be dismissed or transferred by a state court pursuant to the doctrine of *forum non conveniens* if the facts justify same?

Dated: May 22, 1972.

Respectfully submitted,

JOHN J. CORRIGAN
ROBERT W. TAGGART
DOUGLAS E. STEPHENSON

By DOUGLAS E. STEPHENSON

Exhibit One

DECLARATION OF ROBERT W. TAGGART

I, ROBERT TAGGART, declare as follows:

I am an attorney at law, licensed to practice before all the courts in the State of California; that I am one of the attorneys representing SOUTHERN PACIFIC COMPANY in this action; that I am familiar with all of the reports, records, pleadings and proceedings in this action. I have caused an investigation to be made relative to the action which is the subject of this lawsuit. One of the reasons for this investigation was to ascertain the names of all persons who would, in my opinion, be necessary for my defense of this action. These individuals are named in the Declaration of Robert W. Taggart, filed on April 21, 1969. I am the attorney who has been assigned to prepare and try this case for SOUTHERN PACIFIC COMPANY. In my opinion, the testimony of the individuals whose names appeared in my formal declaration is relevant, material and essential to the defense of this case.

Ben Causey was the engineer operating the train on which the plaintiff was riding at the time of the accident. He will testify as to the operation of the engine and train immediately prior to, at the time of and immediately following the accident. He will testify as to the speed of the train, the reason the train brakes were applied, the amount of "slack action" that was generated as a result of the stop. He will also testify as to the duties and responsibilities of an engineer.

M. Bridges was the fireman of the train on which the plaintiff was riding. He will testify that he was seated in the engine in the fireman's seat across from the engineer. He will testify as to the speed of the train just prior to the time the brakes were applied, the amount of "slack action" that was caused by the stop. He will also testify as to the duties and responsibilities of a fireman.

Conductor J. Y. Starkey, Brakeman C. A. Withers and Brakeman W. L. Goodwin will all testify as to the speed of the train just prior to the accident, the degree of severity of the "slack action" at the time the train brakes were applied. Their testimony will also cover radio conversation between the train and the tower in the El Paso Yard. They will testify as to the duties and responsibilities of a conductor and a brakeman. The will testify as to the proper manner in which a person should mount and ride a railroad car.

Engineer R. Haley and Fireman R. B. Rossin will testify that they were operating a switch engine in the El Paso yards at the time of the plaintiff's accident. They will testify that the plaintiff was part of their switching crew. They will testify as to what radio communications were made between the tower and the train on which the plaintiff was riding. They will also testify as to the severity of the "slack action" which occurred when the train brakes were applied. They will testify as to the custom and practice of operating trains and engines in the El Paso Yard. They will also testify as to the duties and responsibilities of an engine crew in a switching operation.

Switchman Ed Bryant and Switchman J. E. Patterson will also testify as to the severity of the "slack action". They will testify as to the custom and practice of switchmen getting on and off of moving equipment in the yards as the plaintiff did just prior to his accident. They will testify as to the proper manner of boarding moving equipment and as to the proper manner of riding on moving equipment. They will testify as to the manner in which the plaintiff customarily performed his job and the manner in which he performed it at the time of his accident.

Car Foreman D. H. Nelson will testify as to the results of his inspection of the car upon which the plaintiff was

riding at the time of his accident. His testimony will show that there were no defects.

Assistant Terminal Superintendent H. E. Hall will testify as to the overall operation of switching in the El Paso Yards, the custom and practice of switching crews in the yards, the safety practices which are engaged in switching operations and the manner in which the plaintiff went about his duties as a switchman. Mr. Hall will also be used to introduce any written safety rules and/or instructions which may be pertinent.

Russell W. Van Norman, M.D., and Chares P. Cavaretta, M.D., will testify as to the injuries initially suffered by the plaintiff, his care and treatment during his period of convalescence and the extent of plaintiff's recovery from his injuries.

I also intend to call as a witness Tower Operator L. E. Cantrell, who will testify as to what, if any, radio communications were had between the tower and the train and also will testify as to the operation of the block signals within the El Paso Yards.

The plaintiff has submitted to the court statements taken by his investigator from some of the witnesses to the plaintiff's accident. He then states that "their testimony would be favorable to the plaintiff." It is respectfully submitted that the proper time to argue the merits of ones case is at the trial of that case. The question before the court here is whether or not the testimony of these witnesses is relevant to this lawsuit. Counsel for the plaintiff suggests that these witnesses will not be presented by the defense at the trial of this action. It is my intention to call each and every one of the employees whose names I have listed in this Declaration as witnesses in the trial of this action. It is uncontroverted that their testimony is relevant and material.

I have no personal knowledge of the statement made by counsel for the plaintiff to the effect that he is enjoined from practicing law in El Paso. I do have personal knowledge of the fact, however, that his firm is indeed practicing law in El Paso. It is also obvious that since the case of *Brotherhood of Railroad Trainmen v. Virginia State Bar,* 377 U.S. 1, 12 L.Ed.2d. 89 (1964) that any injunction from "ambulance chasing" in El Paso would be unenforceable.

Plaintiff's counsel goes to great length to point out the fact that he is an expert in the field of F.E.L.A. litigation. I would most certainly agree with this statement. However, I fail to find any relevance to the issue now before the court. It is uncontroverted that convenience of counsel is not a proper ground upon which to impose this case on a California court.

Plaintiff would have this court believe that he cannot obtain adequate medical treatment in El Paso. Along these lines, I have conducted an investigation and have determined the following. There are 13 Board Certified Orthopedic Surgeons in the City of El Paso, Texas. In addition, there are 2 Board Certified Neurosurgeons and 2 Board Certified Neuropsychiatrists in the City of El Paso, Texas. It should be noted that the treating physician in this case, Russell W. Van Norman, M.D., is a Board Certified Orthopedic Surgeon. He is not an employee of Southern Pacific Company.

I have also conducted an investigation as to the number of lawsuits which plaintiff's counsel's firm has imported into the City and County of San Francisco concerning accidents which occurred outside of the City and County of San Francisco. From January 1, 1960, to June 3, 1969, plaintiff's counsel's firm has filed *219* lawsuits in the Superior Court for the City and County of San Francisco, which concern accidents which happened outside of the City and County

of San Francisco. During the same period of time, the plaintiff's counsel's firm has filed *97* lawsuits in the City and County of San Francisco concerning accidents which happened outside of the State of California. These numbers reflect only lawsuits filed against Southern Pacific Company. They do not reflect only the additional suits which were filed against the other railroads operating in this State.

In *Price v. Atchison, Topeka & Santa Fe Ry. Co.*, 42 Cal. 2d. 577, 580, the court pointed out that:

> "During the years 1947, through and including October 30, 1962, the firm of attorneys which filed this action for plaintiff, filed in the Superior Court of Los Angeles, some 67 actions against defendant based upon causes of action arising in other states under the F.E.L.A. and also filed 21 of such imported cases in the Federal District Courts of this State."

The same firm of attorneys that represented the plaintiff in the *Price* case filed this action and represents the plaintiff in the instant action.

As plaintiff's attorney points out in his declaration, their firm represents the plaintiff's union, and files suit in California against the Railroads for injuries occurring to members of this union in 11 western states.

> A survey conducted by 51 leading railroads showed that during a 5-day period ending in 1946, some 2,512 suits were filed outside the Federal District in which the accident occurred or in which the plaintiff resided at the time of the accident and that 92% of these suits were concentrated in the states of Illinois, New York, Minnesota, Missouri and California. H.R. Rep. No. 613, 80th Cong. 1st Sess. (1947) at 3. Barrett, 35 Calif. L.Rev. 380, 383 n. 14 (1947)

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Francisco, California, on June 6, 1969.

/s/ ROBERT W. TAGGART

Exhibit Two

DECLARATION OF JOHN D. CALDWELL

I, JOHN D. CALDWELL, declare under penalty of perjury as follows:

I am Assistant to the General Claims Manager of defendant SOUTHERN PACIFIC TRANSPORTATION COMPANY and my business address is One Market Street, San Francisco, California 94105. The facts of the above-entitled case were investigated by members of the SOUTHERN PACIFIC TRANSPORTATION COMPANY Claims Department in Texas. I have reviewed the Claims Department's investigation file which is now in the custody of Mr. Robert W. Taggart.

In my capacity as Assistant to the General Claims Manager, I have participated in the investigation and trial of many F.E.L.A. lawsuits in San Francisco Superior Court. Among my duties is arranging the payment of travel and lodging expenses, and per diem (wage loss) of all Southern Pacific witnesses in such proceedings. I am personally familiar with the cost of air travel, meals and lodgings in San Francisco, and the payment of per diem expenses of lay and medical witnesses. I am also familiar with the other F.E.L.A. lawsuits filed in San Francisco Superior Court by plaintiff's attorneys, Hildebrand, McLeod & Nelson.

The purpose of this declaration is to give the court an indication of the volume of imported F.E.L.A. actions filed by non-resident plaintiffs in San Francisco Superior Court and a conservative calculation or computation of the additional travel, lodging and per diem expenses that Southern Pacific will incur if this action be tried in San Francisco rather than Texas.

An indication of the volume of imported F.E.L.A. actions filed in San Francisco Superior Court by non-resident plaintiffs for actions occurring outside California may be derived

from the number of such actions filed by only one Bay Area law firm. That law firm, Hildebrand, McLeod & Nelson, (plaintiff's counsel in this action) has presently pending against Southern Pacific in San Francisco Superior Court 23 such imported lawsuits. All 23 were filed by residents in states other than California and all allege injuries suffered in accidents occurring outside the State of California. The plaintiffs and the San Francisco Superior Court number of each of those imported F.E.L.A. lawsuits are shown on the list attached hereto as Exhibit A and hereby incorporated by reference herein.

The count of pending imported F.E.L.A. lawsuits filed by Hildebrand, McLeod & Nelson shown on Exhibit A hereto does not include cases which have been settled. Further, it is typical of the number of such imported cases which that firm has had pending in this court during the past ten years. It should also be noted that these figures do not include the imported cases which this law firm has filed in San Francisco against the Western Pacific Railroad Company and the Atchison, Topeka & Santa Fe Railway Company.

In order to determine the added cost to Southern Pacific if this action be tried in San Francisco rather than Texas, I have reviewed the file and the declaration of Robert W. Taggart. Mr. Taggart states that Southern Pacific's defense will require the testimony of 11 lay witnesses and five medical witnesses. To use these witnesses, Southern Pacific will be required to pay their per diem, travel, food and lodging expenses. The round trip fare to San Francisco from El Paso, Texas, is $300.00. The cost of food and lodging in San Francisco is at least $30.00 per day for each witness. Each of the proposed five medical witnesses will require a per diem payment of a minimum of $350.00 per day. Using these figures and Mr. Taggart's estimate that each medical witness will be required in San Francisco for three days and each lay witness four days, I have computed the added

cost to the Southern Pacific Transportation Company if this action is tried in San Francisco, and it is approximately $9,310.52. The computation is shown on Exhibit B attached hereto and hereby incorporated by reference.

The computation is, of course, based on a minimum of 11 lay witnesses and five doctors. If any of the other physicians are required at trial, the added cost will be proportionately greater than the figure stated. Also not included in these calculations on Exhibit B are the expenses of Mr. Taggart in traveling to El Paso to interview and depose witnesses in preparation for trial. These costs would also be avoided if the action was tried in Texas and Texas counsel retained by Southern Pacific.

Executed at San Francisco, California, this 21st day of May, 1971.

/s/ JOHN D. CALDWELL.

EXHIBIT A

LIST OF IMPORTED F. E. L. A. LAWSUITS FILED IN SAN FRANCISCO SUPERIOR COURT BY HILDEBRAND, McLEOD & NELSON

Plaintiff	San Francisco Superior Court Number
ALLEN, G.A.	580 129
BAGLEY, J.C.	567 190
CARTER, W.C.	602 669
CROCKER, T.H.	605 703
COEN, H.H.	606 622
FADALA, N.	613 122
FAIRRIS, C.A.	622 884
FICEK, E.F.	600 969
FITZGERALD, J.W.	601 615
FRANCO, J.A.	607 458
HERSEY, P.B.	602 381
HORSLEY, R.K.	593 754
HARRIS, J.L.	602 283
MC KINNON, H.E.	605 837
MARTINSON, D.S.	598 571
NELSON, H.P.	594 219
POTTS, C.G.	598 665
PERALTA, B.B.	620 665
RIVEROS, D.E.	609 824
SONS, J.J.	592 605
SMITH, R.M.	619 325
THOMPSON, L.D.	598 658
WILLIAMS, T.I.	602 379

EXHIBIT B

MINIMUM TRAVEL, LODGING AND PER DIEM EXPENSE OF TRYING CASE IN SAN FRANCISCO

Employee Lay Witnesses:	Round Trip Air Fare	Food and Lodging (4 Days)	Per Diem (Wages) (4 Days)	
Ben Causey, Engineer	$200.00	$120.00	$264.00	
M. H. Bridges, Fireman	200.00	120.00	220.00	
J. Y. Starkey, Conductor	200.00	120.00	200.00	
C. A. Withers, Brakeman	200.00	120.00	320.00	
W. L. Goodwin, Brakeman	200.00	120.00	332.00	
R. C. Haley, Sr., Engineer	200.00	120.00	176.00	
R. B. Rosson, Fireman	200.00	120.00	148.00	
Ed C. Bryant, Switchman	200.00	120.00	292.00	
J. E. Patterson, Switchman	200.00	120.00	180.00	
D. H. Nelson, Car Foreman	200.00	120.00	178.52	
H. E. Hall, Ass't. Terminal Supt.	200.00	120.00	300.00	
	2,200.00	1,320.00	2,610.52	$ 6,130.52

Physicians:	Round Trip Air Fare (El Paso)	Food and Lodging (3 Days)	Per Diem (3 Days)	
Russell Holt, M.D.	200.00	90.00	1,050.00	
R. W. Van Norman, M.D.	200.00	90.00	1,050.00	
Charles Cavaretta, M.D.	200.00	90.00	1,050.00	
Mario Palafox, M.D.	200.00	90.00	1,050.00	
K. Zolfaghery, M.D.	200.00	90.00	1,050.00	
	1,000.00	450.00	5,250.00	3,618.00

Total Air Fare, Food, Lodging and Per Diem: $12,830.52

Exhibit Three

DECLARATION OF ROBERT W. TAGGART

I, ROBERT W. TAGGART, declare:

I am attorney at law, licensed to practice before all the courts of the State of California. I am an officer and agent of Southern Pacific Company, a corporation, and maintain my office at One Market Street, San Francisco, California. I am one of the attorneys representing Southern Pacific Company in this action.

I have reviewed plaintiff's recently filed Points and Authorities and discover that it consists of a lengthy dissertation on jurisdiction, change of venue between California superior courts, and a statement of the law of forum non conconveniens as plaintiff believes it existed many years ago, prior to the many clarifying decisions of the California and United States Supreme Court, as well as the recent enactment of California Code of Civil Procedure § 410.30.

Plaintiff's dissertation is not the law. An accurate and up-to-date discussion of the law of forum non conveniens as applied to F.E.L.A. actions filed in California Superior Courts is contained in the Memorandum of Points and Authorities filed herewith.

Plaintiff asserts that defendant has failed to describe the relevance and materiality of the testimony of the witnesses, all of whom reside out of this state. This assertion is not true. The Declaration of Robert W. Taggart filed June 6, 1969, shows with particularity the knowledge of each of these witnesses, and the testimony reasonably expected to be elicited from them at the trial.

Whether or not the testimony of some or all of these witnesses will be favorable to either side is not only irrelevant to this motion, but it is a factual determination that

no one can make at this time. Furthermore, it is a determination that this court cannot make at any time. That, of course, is a determination that must be left to the jury. Thus, it is a waste of time, for purposes of this motion, to argue, as do plaintiff's counsel that Southern Pacific will not use those persons as witnesses. Whether or not they are used as witnesses by either side, the fact remains that they are the *only* witnesses to the accident and they *all* reside outside the State of California.

With regard to those cases cited by plaintiff on page 11 for the proposition that the convenience of a defendant or employees of a defendant will not be considered, those cases are irrelevant as they each involve motions for change of venue from one California superior court to another. None of the afore cited cases involved a motion for dismiss on the grounds of inconvenient forum in an imported F.E.L.A. action. In all recent cases involving forum non conveniens motions to dismiss imported F.E.L.A. actions, the courts have considered the convenience of employee witnesses. For example, in *Price v. Atchison, T. & S. F. Ry.*, 42 Cal.2d 577; *Great Northern Ry. v. Superior Court*, 12 Cal.App.3d 105 (1970), where the motions were based upon the inconvenience of employee witnesses of the railroad, it was held that such factors must be considered in ruling on the motion. The inconvenience of employee witnesses was considered by Bay Area Superior Courts in granting similar motions to dismiss imported F.E.L.A. actions in the following cases: *McDaniel v. Southern Pacific*, San Francisco No. 605 006; *Stannard v. Great Northern Ry.*, San Francisco No. 612 820; *Stevens v. Southern Pacific Transportation Co.*, San Francisco No. 624 066; and *Farmer v. Great Northern Ry.*, Alameda No. 390 601.

Plaintiff here is simply reiterating the points and authorities and the arguments he has made in *Great Northern Ry., v. Superior Court, supra.* Those arguments were rejected by the District Court of Appeal, the California Supreme Court and the United States Supreme Court.

Plaintiff states that the financial and legal activities of Southern Pacific Company are centered in San Francisco and that the chief claim agent in charge of this case is based in San Francisco. This is not true. The claim agent in charge of this case is Mr. K. W. King. Mr. King works in the City of El Paso, Texas, and resides at 4317 Buckingham Street, El Paso, Texas. It is true that the offices of the general claims agent for the entire Southern Pacific system are located at One Market Street, San Francisco, California. However, they have and will have no personal contact with this case. Further, Southern Pacific Company has on its staff a total of 5 attorneys at One Market Street, San Francisco, who handle F.E.L.A. litigation. Should this case be dismissed and refiled in El Paso, the defense will be handled by local El Paso counsel and not by San Francisco counsel.

Plaintiff states that at one time he was barred from practicing law in El Paso, Texas. It is quite evident that the cases of *Brotherhood of Railroad Trainmen v. Virginia State Bar,* 377 U.S. 1 and *United Transportation Union v. State Bar of Michigan,* 28 L.Ed. 2d 339 have effectively precluded the Texas Bar from enjoining plaintiff's practice in that state. As a matter of fact, plaintiff's attorneys have been practicing law in the state of Texas since the case of *Brotherhood of Railroad Trainmen v. Virginia State Bar, supra,* was published.

This declarant fails to see the relevance of any of the material quoted on page 3 of plaintiff's Declaration. It is quite evident that the examinations of Doctors Bromberg, Tranter and McIvor were solely for the purpose of estab-

lishing a bogus contact within the State of California. It is further evident that the entire course of plaintiff's treatment has been in the City of El Paso under the care of Doctor Mario Palafox. It is true that medical examinations have been conducted by Doctor Robert Samilson and Doctor Rolf G. Scherman of San Francisco. However, these doctors saw the plaintiff but one time for the sole purpose of litigation. This was at a time when the defendant through the declaration of the plaintiff himself and the declaration of the plaintiff's attorney was reasonably lead to believe that the plaintiff would be undergoing active medical care and treatment in the Bay Area and that this case would eventually be tried here.

This declarant has checked with San Francisco Superior Court Commissioner Robert Beale with regard to a probable trial date of this action should it remain on the court's calendar. Mr Beale has informed me that at the present time it takes approximately 33 months from the time the Memorandum to Set has been filed until a trial date is assigned. I have further checked with a representative of the El Paso, Texas Bar and have been advised by him that it takes between 6 and 8 months from the time a case is filed in El Paso until a trial date is assigned. It takes approximately 6 months from the time a case is filed in Federal Court in El Paso until a trial date is assigned. Plaintiff filed his Memorandum to Set in January 1970. Therefore if this case was to remain in the County of San Francisco, it would not come to trial before September 1972. If the case was to be filed in El Paso, on July 1, 1971, it would be coming up for trial in December of this year or January of 1972.

It respectively submitted that the fact the plaintiff's law firm has not tried all of their imported F.E.L.A. cases to a conclusion is irrelevant. If these cases are settled at all,

they are settled on the courthouse steps after all discovery and trial preparation has been completed. The point to be considered by the court is whether a case should be properly filed in this County, where the sole contact is the principal place of business of the defendant, or in the county wherein the accident occurred, the plaintiff resides, all eye witnesses reside, and all treating physicians reside.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed at San Francisco, California, this 7th day of June, 1971.

/s/ ROBERT W. TAGGART
Robert W. Taggart